

Chapter 1

Readiness Recommendations

This page intentionally left blank

I. Introduction

The purpose of this chapter is to describe both the process and the capabilities needed for transferring responsibility for elements of the Superfund program from EPA to states and tribes. The Readiness Workgroup (Workgroup) is one of the four workgroups tasked with planning for an enhanced state and tribal role in the Superfund program. State and tribal readiness, for the purposes of this report, means the ability to implement an effective Superfund program (or elements of the program). The members of the Readiness Workgroup developed a mission statement, which is

“To develop flexible performance standards and a process to assess state and tribal readiness and identify means or needs to enhance readiness. The performance standards should be clearly stated, and the process should be flexible.”

This chapter contains some general themes for establishing a process to define a baseline measure for an effective Superfund program. States and tribes and EPA can use the Modules in Appendix A to assess their programs and, by so doing, decide which capabilities are well established and which need to be more fully developed over time to reach a level that will ensure effective program implementation.

NOTE: Cleanup programs, in this case the Superfund program, are multi-faceted and consist of a variety of program activities. In order to organize all of this material, the Workgroup divided the program activities into “Modules.” Each Module consists of activities for different parts/aspects of the program. The Modules are organized according to the different stages of a cleanup program and will assist in assuring effective program implementation. All twelve Modules are located in Appendix A.

A. Workgroup Membership

The Workgroup consists of representatives from Ohio, Massachusetts, the U.S. Army Corps of Engineers (USACE), North Carolina, Missouri, EPA Region 5 (Regional Counsel’s Office), EPA Region 7 Superfund Division, and EPA Headquarters (Office of Emergency and Remedial Response (OERR), Federal Facilities Restoration and Reuse Office, Office of Site Remediation Enforcement, and Office of General Counsel).

B. Recommendation

The Workgroup recommends that the process for assessing State and Tribal readiness laid out in this chapter be implemented on a pilot basis. The Modules can be used to determine current State and Tribal readiness and areas needing development. When a State or Tribe seeks to assume responsibility for the entire Superfund program or a part of the program, then that State or Tribe should demonstrate capability and authority to carry out all of the activities in each Module. However, it is possible for a State or Tribe to work out an arrangement with the Region to divide work, so long as all of the activities in each Module are addressed. The State or Tribe and Region have a shared responsibility to ensure that all of the

Please send comments to Frey.Sharon@epamail.epa.gov or call (703) 603-8817

program activities are completed.

II. General Themes for Process for Determining Readiness

The Workgroup believes it is most valuable at this point to develop the general themes and direction of the process for determining readiness. A detailed process should be developed during implementation, so that Regions would have flexibility in how best to work with individual States and Tribes. The themes outline general roles and responsibilities of States, Tribes, the public, Regions, and EPA Headquarters. The Workgroup envisions that the State or Tribe would initiate the process by communicating its interest in having a more enhanced role in the implementation of Superfund. This would be followed by the Region and State or Tribe negotiating with each other to sign agreements that designate the division of labor for specific program areas between the Federal and State or Tribal governments. Where a State or Tribe takes on a portion of the program, the State or Tribe will work with the appropriate Region to determine the most effective use of combined Federal and State or Tribal resources, authorities, and capabilities.

The general themes include the following:

1. There should be appropriate public involvement in the decision-making process for each individual State or Tribe to take on parts of the Superfund program (e.g., notice in *Federal Register*, public comment period).
2. An explanation of how a State or Tribe meets the activities in each Module should be submitted by the State or Tribe to begin negotiations with the Region. This process should not be onerous, and should take into account a State's or Tribe's past record of its Superfund activities and experiences (which could include related activities in other programs, e.g., Resource Conservation Recovery Act (RCRA), Underground Storage Tank (UST), and voluntary cleanup programs (VCPs)).
3. Where a State or Tribe takes on a portion of the program (e.g., a few Modules), the State or Tribe will work with its Region to determine the most effective use of combined Federal and State or Tribal resources, authorities and capabilities. As part of EPA and the State or Tribe determining the use of combined Federal and State or Tribal resources, authorities and capabilities, the State or Tribe and EPA should decide which entity will be the "lead regulator" for each site. EPA should provide States and Tribes with assistance to build capacity where needed (see *Chapter 2: Assistance Recommendations*).
4. The Workgroup grouped the program activities in a logical manner in each Module to assure effective program implementation.
5. Regions should be responsible primarily for working with the State or Tribe to assess readiness for an enhanced role. Headquarters should play a support role when needed, and ensure national consistency regarding enhancing the State and Tribal role.
6. There should be a dispute-resolution process. Appeals should start at the staff level among Regions, States, and Tribes and should work their way up the chain of command.

Please send comments to Frey.Sharon@epamail.epa.gov or call (703) 603-8817

- In dispute resolution, EPA Headquarters should be the final decision maker if the dispute cannot be resolved at the Regional level consistent with 40 CFR 31.70 (“Disputes”).
7. Regions should perform differential oversight of Superfund activities undertaken by each State or Tribe (i.e., the level of oversight would vary based on, for example, the complexity of the tasks to be undertaken and a State’s or Tribe’s experience. See #2 above). Differential oversight should be defined in the agreement that is negotiated between the State or Tribe and Region (see Chapter 3: Agreements Recommendations).
 8. Periodic reviews or some other mechanism should be in place to determine that readiness criteria continue to be satisfied by a State or Tribe over time. This mechanism should ensure that significant changes that affect the State’s, Tribe’s, or EPA’s ability to carry out the agreement are brought to the attention of the parties to the agreement to decide what implications/consequences there are to the agreement.

III. Framework for Readiness Approach Developed by Consensus

The Workgroup reached consensus on the assumptions listed below to provide a context for the activities in the Modules and the general themes for the process for determining readiness. All of the assumptions are important in understanding the context of the activities listed in the Modules. The assumptions include the following:

1. Program activities are generic because the content of any future law is unknown.
2. All Superfund elements are “on the table.”
3. No assumptions are made as to the exact form (e.g., “flexible partnership,” delegation or authorization) the program would take.
4. Thoughts are limited to existing pipeline elements.
5. All States and Tribes are eligible, and at least one State or Tribe wants the program.
6. EPA Regions, States, and Tribes will cooperate.
7. There is a need for both long-term and short-term cleanup actions.
8. Federal funding is available. If a State or Tribe spends Federal funds, it must satisfy the minimum criteria outlined by the then-effective Federal laws/regulations.
9. A national system exists to prioritize sites for cleanup that need/want Federal Superfund dollars for Superfund activities.
10. There are no special assumptions made about Federal facilities.⁶
11. Cleanups conducted or overseen by the State or Tribe using Federal funds must be done in accordance with the requirements of whatever the Federal laws/regulations provide at the time and must not be less protective than whatever the Federal laws/regulations provide at the time. If the State’s or Tribe’s liability standards are less stringent than the Federal liability standards and requirements, EPA would take the lead on these portions of the program.

⁶ There are a number of activities which cannot be performed by a State or Tribe for Federal facilities under current statutory construction. Regions and States or Tribes will need to be cognizant of this when drafting the terms and conditions of any agreement between Regions and States or Tribes.

Please send comments to Frey.Sharon@epamail.epa.gov or call (703) 603-8817

12. There is a Federal safety net; i.e., the Federal Government retains all of its legal authorities, but would not generally exercise such authority on State- or Tribal-lead sites (and not without full prior consultation), except when human health or the environment is not being protected.
13. There is a minimum baseline performance standard for each element of the Federal cleanup/enforcement program. States and Tribes may go beyond the minimum baseline.
14. The Readiness Modules should be considered by Regions, States, and Tribes when entering into flexible work-sharing agreements. The Modules contain logically-grouped activities. All activities within each Module must be covered. In attempting to implement an effective Superfund program, States and Tribes should be aware that they do not have to meet all of the activities listed in the Modules. It is assumed that for any activities within a Module that the State or Tribe will not perform, a flexible work arrangement will provide that the Federal Government will perform those activities.

IV. Additional Issues

The Workgroup reached consensus on all of the criteria, recommendations, and findings in this chapter and Appendix A, except the issue regarding Federal principles of fairness and equity as stated below. (Consensus was defined as what the Workgroup members “could live with.”)

In identifying readiness criteria, the Workgroup considered whether adoption of the same or similar Federal principles of fairness and equity should be required of the States and Tribes. EPA has been criticized for inequitable and unfair settlements. During the last few years, to address stakeholder concerns, EPA has placed great emphasis on the principles of fairness and equity within the Superfund settlement context and has issued a number of policies to ensure effective implementation of these principles. Currently, EPA settlements may be based on the PRPs’ individual contributions to site contamination and allow minor contributors and parties with limited financial resources the opportunity for an “early out.” EPA settlement policies that reflect these principles of fairness and equity include policies regarding *de minimis* and *de micromis* contributors, orphan share, and mixed funding.

The Workgroup believed it was important that States and Tribes at least make a statement with respect to the principles of fairness and equity because of the great importance placed upon these principles by the Federal Government and Superfund stakeholders. Further, the Workgroup believed that States and Tribes should consider them when negotiating settlements. Options for tools that EPA, States, and Tribes could use to make this type of statement include: (1) partnership agreements; (2) Memoranda of Agreement; and (3) cooperative agreements. Workgroup members agreed that the mere mention of the principles in public documents such as these would encourage compliance, as it would allow aggrieved parties to publicly raise the issue. The type of vehicle used for stating that States and Tribes should consider the principles of fairness and equity should be decided by the Region and State or Tribe, so together they can determine the most appropriate option considering the specific circumstances.

Please send comments to Frey.Sharon@epamail.epa.gov or call (703) 603-8817

V. Generic Program Components

The Workgroup developed an outline of generic program components of a typical cleanup program. These were developed so as to be able to fit under any Superfund scenario; i.e., the current program or any future reauthorized Superfund program. These program components serve as a basis for States, Tribes, and EPA Regions to develop agreements about how to transfer implementation responsibility from EPA to the States and Tribes. These program components, and the specific activities under them (i.e., the Modules), then become “readiness criteria.” In order for a State or Tribe to assume responsibility for an entire program component (or some logical subset of activities under that component; i.e., a Module), a State or Tribe should have the capability (including legal authority) to carry out each activity. These activities are therefore both (1) a list of readiness criteria when the States and Tribes seek to assume new responsibilities, and (2) a checklist of work activities for Regions and States or Tribes to jointly manage. They are written using generic terminology, rather than Federal Superfund terms, so applicable State and Tribal experiences can more readily be considered. These program components follow below:

1. Site Identification, Screening, Prioritization

The purpose of this component is to ensure that States and Tribes can identify and prioritize potentially contaminated sites to be addressed under CERCLA.

- ◆ Identify sites.
- ◆ Screen sites.
- ◆ Prioritize and evaluate sites for cleanup.
- ◆ Prioritize and evaluate sites for Federal eligibility.

2. Short-term Action Activities

The purpose of this component is to ensure that States and Tribes have the ability to conduct and compel expedited evaluations and expedited actions.

- ◆ Conduct and compel urgent evaluations and cleanups.
- ◆ Conduct and compel expedited evaluations.
- ◆ Conduct and compel expedited cleanups.

Please send comments to Frey.Sharon@epamail.epa.gov or call (703) 603-8817

3. Long-Term Action Activities

The purpose of this component is to ensure that States and Tribes can fully characterize and compel the characterization of sites, select a cleanup option and compel the selection of a cleanup option, and conduct and compel implementation of a long-term cleanup.

- ◆ Characterize, and compel the characterization of, sites for long-term cleanup actions.
- ◆ Identify, evaluate, select, and compel potential cleanup actions.
- ◆ Design, implement, and compel site cleanups.
- ◆ Have the ability to conduct and compel temporary and permanent relocations.

4. Post-Cleanup Site Monitoring and Evaluations

The purpose of this component is to ensure that States and Tribes can conduct operation and maintenance and other site maintenance activities, ensure that the cleanups remain protective, determine when/if a site is clean, and prepare necessary deletion documentation.

- ◆ Conduct and compel post-cleanup monitoring and evaluations.

VI. Common Activities To Determine Capability

The Workgroup created a list of activities that are the foundation for an effective cleanup program, and which apply to activities across the program. Regardless of what portion(s) of the program the State or Tribe is interested in taking responsibility for, it should be able to implement the following common activities, as appropriate. Unless otherwise indicated, each activity described may be funded by EPA under the current statute, regulations, and program. CERCLA §104(d) authorizes EPA to enter into cooperative agreements with States and Indian Tribes to carry out activities authorized by CERCLA §104. 40 CFR Part 35, Subpart O codifies the requirements for Superfund Cooperative Agreements.

A. Access to Resources

1. *Trained Personnel:* The State or Tribe should have the ability to train and/or access trained personnel who are capable of fulfilling the particular tasks outlined in the chapter and Modules. There should be a sufficient number of personnel commensurate with the workload, and the State or Tribe should have the capability to ensure that future training needs are met. The type of trained personnel (in-house or contract⁷) that will be necessary include:

⁷ It is not appropriate for contractors to perform inherently governmental functions (e.g., making cleanup and enforcement decisions and deciding on a State's priorities).

- (i) Personnel with appropriate health and safety certifications.
 - (ii) Government (e.g., USACE, U.S. Bureau of Reclamation (BoR), the Agency for Toxic Substances and Disease Registry, other State health departments, and other State agencies) or contract personnel capable of conducting human health risk assessments, ecological risk assessments, hydrogeological evaluations, chemical analysis, legal work (e.g., legal analysis and litigation), community interaction, and engineering analysis.
 - (iii) Federal, State, or Tribal personnel capable of procuring, administering, and monitoring contractors and site progress.⁸
 - (iv) Personnel capable of PRP searches, as appropriate, which entail such activities as tying PRPs' liability to the site and financial analysis of PRPs.
 - (v) Personnel trained in conducting field activities in accordance with standard operating procedures that the State or Tribe should have in place for conducting these field activities.
2. *Analytical Services:* Based on the types and number of sample analyses that will be needed, the data quality (level of data quality that data must meet), turnaround times, and anticipated numbers of each type of analysis, the State or Tribe should be able to:
- (i) Ensure that there is an agreement in place with a laboratory to provide these services.
 - (ii) Ensure laboratory certification or other mechanisms are in place to assure data quality.

B. Public Access to Non-Enforcement Sensitive Documents

1. The State or Tribe should ensure that public documents generated under State or Tribal implementation of the Superfund program will not be less accessible to the public than if the program were Federally implemented.
2. The State or Tribe should have the authority to withhold from release confidential documents (including enforcement sensitive, confidential business information, deliberative) in accordance with whatever the Federal laws/regulations provide at the time (e.g., 40 CFR Part 2, Subpart B). (Note: Many State Freedom of Information laws are less stringent than the Federal Freedom of Information Act.) Public access to documents and data may include electronic access.

⁸ Ibid.

C. Community Involvement

The State or Tribe should be able to ensure the appropriate level of community involvement, depending on the activities being implemented.

D. Health and Safety

The State or Tribe should be able to ensure that appropriate health and safety plans/measures are implemented, as necessary.

E. Coordination With Other Agencies

The State or Tribe should have the ability to ensure that cooperative work mechanisms (e.g., letters, Interagency Agreements, Memoranda of Agreement, contracts) and support from other Federal and State agencies can be obtained as necessary.

F. Budgetary, Accounting, Procurement, Cost Recovery, and Tracking Systems

1. The State or Tribe should be able to provide the information needed to track site activities and financial expenditures, as necessary, to support assistance agreement obligations, cost-recovery actions, and other Federal reporting requirements. Information may include investigation costs, oversight billing, etc., and should be provided in an electronic format that is compatible with EPA data systems or can be easily converted for use with EPA data systems.
2. The State or Tribe should be able to ensure that indirect and direct costs are documented for ultimate purposes of cost recovery.
3. Based on the proposed work plan of activities to be conducted, the State or Tribe should present an estimated budget and indicate a source of funding, including the Federal dollars needed to implement the program. The State or Tribe should also have the ability to obligate, allocate, and be accountable for (i.e., manage appropriately and responsibly) funds to complete cleanup.

G. Site Access and Information Gathering

The State or Tribe should be able to secure site access and obtain site information.⁹

⁹ CERCLA §104(e)(1) authorizes any designated officer, employee, or representative of a State or Tribe operating pursuant to a Superfund Cooperative Agreement to take action under §104(e)(2)(access to information), (e)(3)(entry), (e)(4)(inspection and samples).

H. Site Records

The State or Tribe should be able to ensure that decision-making processes are documented by creating site records, ensuring site activities are tracked, and maintaining comprehensive files describing rationale for site decisions. For short-term actions, documentation would be done at an appropriate time based upon the nature of the site condition.

I. Site Closeout

The State or Tribe should agree with EPA upon a procedure for determining when no further Superfund action is required at any point in the Superfund process.

VII. Conclusion

EPA believes that it is important to assess State and Tribal readiness objectively, while taking into account the wide variation of capabilities among States and Tribes. EPA also believes that a flexible process is important for assessing readiness. The process and Modules in Appendix A allow for effective implementation of the Superfund program with a larger role for States and Tribes. This process will help to ensure consistent and objective decisions about enhancing the role of States and Tribes in the Superfund program, both in the near term (current law) and in the longer term (potentially a reauthorized Superfund law). Additionally, the process will help ensure strong management and administration of the Superfund program as more activities are implemented by States and Tribes.

Please send comments to Frey.Sharon@epamail.epa.gov or call (703) 603-8817

This page intentionally left blank